NO. 11,063

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD ROLAND HAUGEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the District Court of the United States for the Eastern District of Washington

---

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Section 41 (2) U. S. C. A. and Title 18, Section 73, U. S. C. A.

STATEMENT OF THE CASE

The appellant, RICHARD ROLAND HAUGEN, was charged by indictment containing three counts with possessing, publishing and uttering counterfeit meal tickets with intent to defraud the Olympic Commissary Company, an agent of the United States of America, in violation of Title 18, Section 73, U. S. C. A. It was further charged that the meal tickets referred to were spurious forgeries of original meal tickets issued by the Olympic Commissary Company, a corporation, which was alleged to be an agency of the United States of America, charged with the duty of furnishing meals to workmen employed upon a defense project being conducted by the United States Army Engineer Corps at Hanford, Washington. (This is the project where the atomic bomb was manufactured.)

The case was tried before the court, sitting without a jury. The evidence introduced by the government, and undisputed by the defendant, demonstrated:

1. That the United States Army Engineers instituted the construction of a vast manufacturing project in the south central portion of the State of Washington, following condemnation of approximately 400,000 acres of land to be used for this purpose;

2. That in carrying out this project, they enlisted the assistance of two agents:

(a) The E. I. duPont de Nemours Company, a corporation,

(b) The Olympic Commissary Company, a corporation.

Evidence was introduced to show that the duPont Company, as it will be referred to herein, received a fixed fee of $1.00 for constructing all of the manufacturing plants and buildings and installing all of the equipment necessary for the work to be carried on, known as the Hanford Engineers Project; that the United States Government supplied all of the money constituting the cost and expense of construction and operation of this project; that the United States Army Engineers, under the terms of their agency contract with the duPont Company and the Olympic Commissary Company, supervised all of the purchases made by each of its agents, supervised the inspection of all property and equipment purchased by each of its agents, and kept and maintained a revolving fund in banks, subject to check withdrawals by the duPont Company, from which funds all of the costs and expenses of construction of the plants referred to were defrayed. (T. of R. 101-128, 130, 135, 139, 166-172.) Exhibits Q. (T. of R. 192); R (T. of R. 255); S (T. of R. 260); T (T. of R. 268).

The trial judge fully recognized that the duPont Company and the Olympic Commissary Company were mere agents of the United States in the construction, development and maintenance of chemical and manufacturing plants on the Hanford Project.

(T. of R. 179, 180, 181.) Neither the appellant nor anyone in his behalf has contended to the contrary. Neither of the agencies had any of the powers of an independent contractor, as was aptly pointed out in the testimony by Lt. Col. Ralph G. Cornell. (T. of R. 139-166.) The United States Government not only paid for the entire cost of construction and operation, item by item, as expended by the duPont Company and Olympic Commissary Company, but supervised, controlled and inspected every phase of the work and every article of merchandise that was purchased for the construction and operation of the project. Title to all purchases made on the project by these agents, vested in the United States immediately upon delivery. (T. of R. 116, 117, 257.)

On June 14, 1944, the defendant and government, having waived jury trial, the cause came on for hearing before the Honorable Lewis B. Schwellenbach, Judge. R. Max Etter, Assistant United States Attorney, represented the Government. He made a very thorough and extended opening statement, pointing out the various elements of proof which the Government would present, at the conclusion of which defendant's counsel moved for a dismissal upon the matters stated in the opening statement, and, to quote him, "and for the further and additional reason that the indictment or any counts thereof do not state facts sufficient to constitute a crime." (T. of R. 54.) The trial judge denied the motion for dismissal on the opening statement, but considered the oral demurrer of the defendant's counsel to the in-

dictment as well taken and entered an order sustaining such oral demurrer, holding that the indictment did not state facts sufficient to charge a crime in any of its counts.

Thereafter a second indictment was returned by the Grand Jury against the defendant, charging the same offenses which had been alleged in the three counts of the original indictment but alleging with a higher degree of strictness the facts upon which the violations were predicated. This cause then came on for hearing before the court sitting without a jury, the defendant and the government again having waived trial by jury. At this trial, Major R. F. Ebbs testified for the Government respecting portions of the contract entered into between the United States of America and the E. I. duPont de Nemours Company, by the terms of which the latter corporation became the agent of the government for the construction of the Hanford Project. He testified that the contract was secret under Order of the Department of War (T. of R. 103, 104) and that it could not be produced in court or made public property in any sense, or its entire contents revealed even to the Judge of the Court or other public officials (T. of R. 105). He likewise testified in similar fashion concerning the contract between the duPont Company and the Olympic Commissary Company, by the terms of which the latter corporation became an agent of the government for the performance of certain functions at the Hanford Project, one of which was the furnishing of meals for the vast army of workmen

who were recruited throughout the country and employed at that place (T. of R. 105-130). The matter of the defendant having secured the counterfeit meal tickets from a printer in Tacoma, the selling of them by him to certain employees on the Hanford Project, the possession of 966 spurious meal tickets by him in his hotel room at Yakima at the time of his arrest, were all detailed without contradiction by the defendant, personally, or through any witness (T. of R. 69, 72, 76, 78, 84, 94-101, 167).

The Court took the entire case under advisement instead of rendering an immediate opinion following completion of testimony and argument. In his memorandum opinion (T. of R. 9), 58 Fed. Supp. 436, the Court held that the army officer had a right to refuse to disclose confidential information and that because of the war emergency and stress of the times, the government had a right to offer secondary evidence of the pertinent portions of the contract existing between the United States of America, the du-Pont Company and the Olympic Commissary Company, but the Court, discrediting the testimony of Major Ebbs that he had a certified copy of the contract in his office as Area Engineer of the Hanford Project and was testifying from that certified copy rather than from the original, which the witness stated he had never seen, ruled that the government had not presented the *best* secondary evidence available and held that the duty had devolved upon the government to furnish the best secondary evidence available under the circumstances, which would have

been the oral testimony of a trained lawyer or legal officer of the Army who had read and was familiar with the *original* contract between the United States and the duPont Company for construction of the Hanford Project. From this the Court concluded that he should have sustained objection to the introduction of Major Ebb's testimony; that he should in deciding the guilt or innocence of the defendant, discredit the Major's testimony, and thus was forced to the conclusion that the government had failed to sustain the burden that the Olympic Commissary Company was an agency of the United States. (T. of R. 9).

Immediately upon filing of this opinion, the United States Attorney served and filed a motion for an order permitting the reopening of the cause for the purpose of supplying that type of secondary evidence relating to the agency contracts between the Olympic Commissary Company, the duPont Company and the United States of America, which the Court in its rather technical ruling had held to be absent in Major Ebb's testimony. This motion was granted; an order permitting the reopening of the cause for the purpose stated was entered (T. of R. 23, 24) and hearing was had at which Lt. Col. Ralph G. Cornell testified (T. of R. 139.) This witness testified he was legal advisor to the Chief Engineer of the United States Army at Washington, D. C.; that his particular specialty was contracts, claim matters and general legal problems; that he held the commission of Lieutenant Colonel in the United States Army; that he had charge of the negotiatioins of the Hanford

Project contract between the United States Army and E. I. duPont de Nemours Company, and that he had charge of the drafting of the original contract and was familiar with its terms. He then delineated its terms insofar as they related to the relationship of the agency existing between the United States Army, the duPont Company and the Olympic Commissary Company, (T. of R. 141-166.) With this evidence before the Court, a finding of guilt was immediately entered and the defendant was sentenced and adjudged guilty. Following entry of judgment and sentence, this appeal was taken.

APPELLANT'S ASSIGNMENT OF ERROR

The assignments of error on appeal may be resolved as follows:

1. The Court erred in permitting the trial upon the second indictment returned by the Grand Jury against the defendant, for the reason that jeopardy had attached to the original hearing when the defendant's counsel moved for dismissal on the opening statement and proposed oral demurrer to the indictment.

2. The court erred in admitting testimony of a secondary character relating to the contract of agency existing between the United States of America and E. I. duPont de Nemours Company, and the duPont Company and the Olympic Commissary Company, without requiring the production of such contracts in their original form.

3. The court erred in entering an order permitting reopening of the cause in the taking of testimony of Lt. Col. Cornell after the court had filed a memorandum decision holding that the cause must be dismissed.

4. That the proof submitted by the government was not sufficient to show that the defendant, by his act of possessing and uttering counterfeit Olympic Commissary Company meal tickets, intended to defraud the United States.

ARGUMENT

I. Discussion of Appellant's First Assignment of of Error, viz., That He Had Been Twice Placed in Jeopardy.

Jeopardy did not attach at the original hearing for the reason that the indictment was insufficient to charge a crime and was so contended by defendant's counsel and so held by the court. One of the essential elements to a claim of former jeopardy is that the defendant is being tried in a court of competent jurisdiction upon a valid indictment or complaint and that a witness had been called and sworn to testify.

No point is here urged upon the technical ground that no witness had yet been called when defendant's counsel interposed his oral demurrer to the indictment, though that claim could with justification be made under the federal system where the common law rule obtains. Here the government contends that since the indictment was invalid, jeopardy did not attach. This rule is fundamental in criminal law. The following cases so held:

United States v. *Agresti*, 39 Fed Supp. 16, 130 F. (2d) 152;

Wolkoff v. *United States*, 84 F. (2d) 17;

Amire v. *Tines*, 131 F. (2d) 827.

United States v. *Jones*, 31 Fed. 725.

No rule of procedure permits a defendant to wait until a trial starts to interpose his demurrer challenging the validity of an indictment, securing a successful ruling thereof, and blocking further prosecution upon a valid indictment upon a plea of former jeopardy. The two claims are wholly illogical and inconsistent and lead to a conclusion which is nothing more than a legal absurdity. There can be no jeopardy without a valid charge. No defendant can claim an invalid charge, and after being successful in such claim, set up jeopardy on the theory that the charge which he claimed was invalid has suddenly for his purposes become valid.

II. Discussion of Appellant's Second Assignment of Error, viz., That Secondary Evidence of the Agency Contracts Between the United States, the duPont Company and Olympic Commissary Company was Inadmissible.

The court will now take judicial notice of the fact that the atomic bomb was developed and manufactured on the Hanford Project and used in warfare under the most stringent veil of secrecy so far revealed in military history. In order to accomplish this end it was necessary that no phase of the work at Hanford become public property either through public court records or otherwise. The Second War Powers Act which gave the President and the Secretary of War under the President authority to do all the things necessary to defend the nation and wage war, provided in its applicable portion as follows:

> "The President shall not publish or disclose any information obtained under this Paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony, and upon conviction thereof shall be fined not exceeding $1000 or be imprisoned not exceeding two years or both." (Title 50, Sections 632, 633 (4) U. S. C. A.)

An Army regulation, which has the force of law as held in *United States* v. *Johnson*, 316 U. S. 481, provides, Section 380-5, Paragraph 5, as follows:

> "Secret Material—Dockets, information or material the unauthorized disclosure of which would endanger national security, cause serious injury to the interests or prestige of the nation, or any government activity thereof, or would be of great advantage to a foreign nation, shall be classified secret."

The contracts between the United States Army and the duPont Company and the Olympic Commissary Company were respectively classified as secret and restricted (T. of R. 101-128, 139-166). Therefore, these contracts could not be offered in evidence. Accordingly, secondary evidence concerning their applicable portions to the issues before the Court became admissible. That this is the rule is well established.

Wigmore on Evidence, 3rd Ed., Sec. 2378;

In re Grove, 180 Fed. 62. C. C. A. 3;

Firth Sterling Steel Company v. *Bethlehem Steel Company*, 199 Fed. 353.

The trial judge collected all the authorities on this question in his very excellent opinion in the above captioned case, to be found at 58 Fed. Supp. 436. The government has no quarrel with the trial court holding with strict technical exactness that the certified copy of the prime contract in possession of Major Ebbs did not, under the Shop Book Rule of Evidence, Title 28, Section 695, U.S.C.A., constitute a proper basis for Major Ebbs' oral interpretation of the terms of that contract. It was an authenticated copy of the original contract, possessed by Major Ebbs, in the regular course of business under the authority of the highest military officer in the government, the Secretary of War. The writer's personal view is that Major Ebbs' testimony, interpreting this authenticated copy then in his possession, came within the Shop Book Rule and was in itself a competent basis for Major Ebbs' oral testimony (T. of R. 122). However, the government complied with Judge Schwellenbach's ruling on the point of evidence, though its attorneys had no way of knowing that the evidence was objectionable until Judge Schwellenbach's opinion was filed.

III. Discussion of Appellant's Third Assignment of Error, viz., That the Court's Memorandum Decision was a Final Judgment of Dismissal.

The appellant has assigned the reopening of the cause as error.

Appellee's motion to reopen the cause, for the purpose of supplying evidence held to be lacking by the Court's opinion, was promptly made, at a time when the Court was not in session and before judgment, either oral or written, had been entered upon the memorandum opinion. The matter of reopening a criminal case for reception of further evidence before the entry of judgment, either of dismissal or guilt, is one which lies within the sound discretion of the Court. Rules of Criminal Procedure for District Courts (Title 18, Section 688 U. S. C. A.) provides that a judgment shall be imposed by the court if there be:

(a) A plea of guilt

(b) A verdict of guilty by the jury, or

(c) Finding of guilt by the trial court where a jury is waived.

At best, the Court's memorandum opinion was merely the Court's then opinion on the legal questions raised during the course of the trial, and was not final. Before judgment the Court could have amended or modified its terms.

People v. *Grana*, 36 Pac. (2d) 375 (Calif.); also 29 Pac. (2d) 461, City of Norwich, 274 Fed. 374;

Rogers v. *Hill*, 289 U. S. 582, page 587;

McGhee v. *Leitner*, 41 Fed. Supp. 674;

Rothschild and Company v. *Marshall*, 44 F. (2d) 546, page 548;

First National Bank of Graham v. *Weitzel*, 239 Fed. 497;

Lahman v. *Burnes National Bank*, 20 F. (2d) 897, page 899.

See also: *Uhl* v. *Dalton* (C.C.A. 9) Filed October 25, 1945 (opinion by Justice Mathews).

IV. Discussion of Appellant's Fourth Assignment of Error, viz., That the Proof Submitted By the Government Was Not Sufficient To Show that the Defendant, By His Act of Possessing and Uttering Counterfeit Olympic Commissary Company Meal Tickets Intended to Defraud the United States.

The statute under which appellant was charged in its applicable portion recites as follows:

> "Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, * * * any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabeling any other person, either directly or indirectly, to obtain or receive from the United States, *or any of their officers or agents*, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; * * * shall be fined * * *." (Title 18, Sec. 73, U.S.C.A.)

The Court found, from the evidence presented by

the government, that the Olympic Commissary Company was an agent of the United States. His exact language was:

> "Under that testimony I believe that the Government has proved that the Olympic Commissary Company was an agency of the United States. Agencies of the United States are necessarily limited in their power to bind the United States. I doubt whether the United States Government can enter into a general agency agreement and give to any individual or corporation the same broad powers as an agent which an individual can, but the courts have recognized for a long time it is possible for the Government to establish individuals or corporations as its agent.
>
> Here we have an agency agreement with the du Pont company, which gave to the du Pont company the right, subject to strict supervision and control, and to the further restriction of approval, before such subagency could be created.
>
> Under this contract a revolving fund was set up. I do not think even the du Pont company or the Olympic Commissary Company would have the broad power of agency under the du Pont contract, as has been explained to us by the witness, or the Olympic Commissary Company contract, to bind the United States Government for everything (146) that they might try to do. They certainly have the power to bind the Government in so far as the operation of this business is concerned, and in so far as the funds which were established by the United States for this business by the original contract and the subcontract are concerned." (T. of R. 179-180)

This excerpt from the Court's oral decision at the conclusion of the case is set forth for the purpose of emphasizing the careful study and attention which

the trial Judge gave to this very important phase of the case.

Since the Olympic Commissary Company was an agency of the United States for the construction of a military plant at Hanford, Washington, any fraud imposed upon it comes within the statute. The trial judge was most consistent in his reasoning when he said:

> "That brings us to the next question, whether or not there was any intent upon the defendant's part to defraud an agency of the United States.
>
> Every individual is presumed to know the consequences of his acts, and to intend to do those things which he does do. There can be no doubt under the testimony here that when this defendant had these commissary tickets printed in the form they were, and made the use of them he did, that he intended to defraud somebody. He had the intent to defraud.
>
> It is equally clear he had the intention of defrauding the Olympic Commissary Company Now that is the intent which is necessary. It is not necessary for him to know that the Olympic Commissary Company was an agency of the United States. The Olympic Commissary Company just happened to be an agency of the United States, and he intended to defraud this concern, which at that time and under those circumstances *was an agency of the United States.* It seems to me clear he did it with the intent, the clear intent, to defraud this agency of the United States, and as a result of his acts he did defraud, to the extent that the tickets were passed, and he was defrauding the United States." (Italics supplied) (T. of R. 181-182)

In discussing a similar prosecution under Sec. 72 of the Act, Judge Moscowitz of the Eastern District of New York stated:

> "It is the defendant's contention that he had no intention of defrauding the United States in forging these prescriptions and uttering the same. He admits that the prescriptions were filled by a druggist and that he received the narcotic drugs. The crime is complete. The law infers the intent to defraud from the defendant's acts." (*United States* v. *Hall*, 58 Fed. Supp. 773)

He then cites the case of *U. S.* v. *Tynan*, 6 F. (2d) 668 and many cases cited therein and concludes his opinion with the following language:

> "The defendant will not be permitted to testify that he did not intend to defraud the United States when his admitted acts constituted such defrauding."

It is not necessary, however, to look beyond the decisions of this Ninth Circuit Court for authority supporting Judge Schwellenbach's observations in the instant case. In *Johnson* v. *Warden*, 134 F. (2d) 166, this Court stated:

> "We entertain no doubt that a forged physician's prescription for narcotics falls within the meaning of the phrase "other writing" as used in that statute. It was said in *Prussian* v. *United States*, 282 U. S. 675, 51 S. Ct. 223, 75 L. Ed. 610, that the words "other writing" as used in a companion statute, Sec. 29 of the Criminal Code, 18 U.S.C.A. Sec. 73, were included for the purpose of extending the penal provisions of the statute to all writings of every class if forged for the purpose of defrauding the United States."

This Court also held in the same opinion that:

> "It is enough that the unlawful activity be engaged in for the purpose of frustrating the administration of a statute, or that it tends to impair a governmental function."

In *United States* v. *Houghton*, 14 Fed. 544, the Court used the following language:

> "The rule here is, as stated by the best authorities, that if a man intends to do what he is conscious the law, which every one is presumed to know, forbids, there need not be any other evil intent shown. In such a case the law infers the intent to defraud from the act. If you are convinced that the defendant knew the false character of the payroll when he transmitted it to the government, you are not obliged to look further than that to find a fraudulent intent on the part of the defendant."

In the same connection the case of *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537 should be read. This was a *qui tam* or informer action brought in the name of the United States on behalf of the informer who alleged fraudulent collusion among contractors who were performing services for the Public Works Administration and who specifically were charged with defrauding the United States Government by collusive bidding on the project resulting in the presentation of false claims to the United States Government. The Supreme Court held that it was not necessary to prove a contractual relationship between the defendants and the Government, it having been proven that the defendants' contracts were made with local

governmental units, rather than with the United States Government, though evidence shows that their pay came from the United States. Mr. Justice Black speaking for the Court, said:

> "The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal —payment of government money to persons who had caused it to be defrauded."

This Court also held that the same rule applied in criminal prosecutions under the false claim statute, 18 U. S. C. A., Sec. 80, the opinion using the following language in holding that the rule of criminal procedure should likewise apply to *qui tam* actions:

> "* * * we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer."

See also *United States* v. *Gonzales*, 56 Fed. Supp, 995. This was a prosecution under Title 18 U. S. C. A., Sec. 80 charging conspiracy to defraud the United

States by causing false claims against the government to be presented. The claims of the defendant are quite similar to those made by appellant in his brief. His argument is summarized by the Court as follows:

> "1. The defendant was employed by the Shipyard, a private corporation, and not by the Navy Department or by any branch or agency of the United States Government.
>
> 2. No money was paid by the United States Navy Department to the defendant or any of his fellow conspirators.
>
> 3. No claim for payment was ever made or presented, or caused to be made or presented, by the defendant or anyone in his behalf, for payment or approval, to any person or officer in the civil, military or naval service of the United States, or any department thereof; nor was any false or fraudulent statement or entry made or caused to be made in any matter within the jurisdiction of any department or agency of the United States."

The Court in denying the motion to quash stated:

> "The defendant and his fellow conspirators, according to the allegations of the indictment, conspired to set in motion the machinery which would eventually result in the presentation of false claims to the Navy Department."

The *Gonzales case, supra*, is closely analogous in fact and relationship of parties to the instant case, but appellant's contention that there was a failure of proof to show knowledge on his part that he was defrauding an agency of the United States, is met

by very competent evidence touching this viewpoint, though no concession is here made by appellee, in discussing this phase of the case, that the government was burdened with the responsibility of proving knowledge on the part of the defendant that the Olympic Commissary was an agency of the United States. This question is fully disposed of by the reasoning and language of the *Johnson* and *Hall* cases, *supra*, and by the Statute, Title 18, Section 73.

Exhibits N., O., P. were photographs that are not before the writer of this brief, having been transmitted in original form to the Circuit Court of Appeals, and not included or reproduced in any manner in the transcript of record. The Assistant United States Attorney who tried the case before the District Judge offered a series of photographs in evidence. He was given no opportunity to identify them by the F. B. I. agent who was a witness on the stand at the time of the offer. The reason for this was the interruption by defendant's counsel who suggested that all of the photographs which Assistant United States Attorney Erickson had before him in Court and which he was about to identify by the witness, be offered in evidence at one time. This is clear from the colloquy as it appears in the record.

> "Mr. Erickson: I hand you plaintiff's idntification "H", (58) and ask you to state what that is?
>
> A. It is a photograph of a sign which appears on the Hanford Reservation, a picture of the sign.
>
> Mr. Sandvig: If you will offer them all in evi-

dence, my objection will be the same to all of them. Offer that one.

Mr. Erickson, I offer "H" in evidence. What are your objections?

Mr. Sandvig: The witness says this one appears on the Hanford Reservation. That is what I am afraid of, Judge, that we will get this case where we are trying to make a case out of nothing. In other words, who put it there? Maybe I put it up there. Who had the authority to put it up?

The Court: Let me see the rest of the pictures. (Pictures handed to the Court)

Mr. Sandvig: They are all in the same category.

Mr. Erickson: They purport to show the general character of the property there inside the mess halls.

Mr. Sandvig: If I put them up there and I did not have any authority, they should have arrested me. That is the danger in this case.

The Court: I will sustain the objection to "M", "L", "K", "J", and "H", and admit "N", "O", and "P", and allow an exception. (59)

(Testimony of C. E. Piper.)

(Photographs admitted in evidence as plaintiff's exhibits "N", "O", and "P".) (T. of R. 100-101)

It is clear that the only objection which defendant's counsel had to the exhibits related to the authority of whoever might have placed them in the mess hall and about the Hanford Project. No objection was heard then that the identification of the exhibits was incomplete because of the time of their display in the mess

hall. No opportunity was given Government counsel to further identify these exhibits by the learned trial judge, and certainly the language of defendant's counsel's objection conveyed no intimation to the learned trial judge or government counsel that lack of identification as to time of display in the mess hall was the ground of the objection. It comes with poor grace now for defendant's counsel to claim that the time of posting of the pictures represented by the exhibits which were received, may or may not coincide with the time the defendant was an employee of the Hanford Project. One of these pictures depicted a large sign visible to all workmen sitting in the mess hall frequented by the defendant Haugen—Mess Hall No. 7—"This is a Federal project. Those violating the law hereon will be subject to federal prosecution".

The very secrecy which prevaded the atmosphere surrounding the Hanford Atomic Bomb Project, of which the trial judge was fully aware, he having handled all of the condemnation cases involving the taking of land for this project, demonstrated it to be an important military undertaking under the control of the United States Army Engineers. See Judge Schwellenbach's remarks during the trial.

> "* * * I put the title through myself that the real estate belongs to the Government, and (70) the buildings constructed thereon must necessarily belong to the Government." (T. of R. 111)

The presence of military personnel at the gates, the extreme caution with which every person entering

and going from the Project's gates was inspected and examined, the constant mystery as to what type of chemical or ammunition would be manufactured at the project, the vastness of the area of land involved —some 400,000 acres condemned by the United States of America and dislodging thousands of farmers in the area—the enormous army of men and women who were recruited for employment—some 47,000, the constant newspaper references to the Government's condemnation cases and to the vastness of the project itself, were all factors which any normal American present and seeing would, of necessity understand to be the external evidences of a gigantic governmental operation engaged in aiding the prosecution of the war. These matters, however, are secondary in character, and are not of essential importance in determining the question before us. As stated at the outset of the discussion of this assignment of error, the evidence was conclusive and without dispute that the Olympic Commissary Company was *an agency of the United States of America*; that the defendant knowingly and willfully procured counterfeit meal tickets for the purpose of defrauding the Olympic Commissary Company. This made the crime complete. To repeat the words of Judge Moscowitz in *United States* v. *Hall, supra*:

> "The defendant will not be permitted to testify that he did not intend to defraud the United States when his admitted acts constituted such defrauding."

CONCLUSION

Summarizing the foregoing, it is respectfully submitted that appellee has met the contentions of the appellant as follows:

I. The defendant was not in jeopardy as a result of the first hearing for the reason that the indictment in the first hearing was claimed to be invalid by the defendant's counsel and found to be invalid by the trial court. Jeopardy is premised upon a valid indictment or charge.

II. Secondary evidence of the contracts setting up the duPont Company and the Olympic Commissary Company as agencies of the United States of America was properly admissible for the reason that the President of the United States, under the authority vested in him in the War Powers Act, had ordered that the prime contract between the United States Army and the duPont Company be considered secret and the Department of War had ordered that the contract between the duPont company and th Olympic Commissary Company be considered restricted. This was war and the protection and very existence of the Nation was involved. Established peace time rules of evidence must give way to the emergencies of war in such times.

III. The matter of reopening the case following the filing of the Court's memorandum decision and before pronouncement of judgment was wholly within the discretion of the trial judge and this discretion was most certainly properly exercised in this case for the

reason that the Court had, to all outward appearances, approved the admissibility of the testimony of the witness, Major Ebbs, and the government's counsel had no means of knowing that the Court would, later, disapprove it, until the Court's opinion was filed. As the trial judge pointed out, he felt it his judicial duty to permit the government to supply that degree of secondary evidence which his opinion established as a requirement of the case. (T. of R. 178)

IV. The argument that the defendant did not know he was defrauding the United States when he defrauded the Olympic Commissary Company falls in view of the language of the statute, Sec. 73, Title 18, which makes it a crime to defraud an agency of the United States, the Olympic Commissary Company having been established, without dispute, to have been an agency of the United States in the transactions under inquiry.

For the foregoing reasons appellee respectfully submits that the judgment of the District Court should be affirmed in all particulars.

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